Supreme Court, U.S.
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No. 04-426

IN THE

Supreme Court of the United States

THE GARTER BELT, INC.,
a Michigan Corporation d/b/a Legg's Lounge,

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Michigan Court of Appeals err in rejecting a constitutional First Amendment challenge against enforcement of a township ordinance prohibiting nudity in any establishment regulated by the Michigan Liquor Control Commission and prohibiting the proprietor or operator of such an establishment from allowing such conduct?

Did the Michigan Court of Appeals err in rejecting a challenge to an ordinance for overbreath and vagueness?

Did the Michigan Court of Appeals err in affirming a judgment and permanent injunction that grants summary judgment in favor of the Township and against The Garter Belt, Inc. d/b/a Legg's Lounge and permanently enjoins it from violating the Township's ordinance prohibiting nudity in liquor-licensed premises in the future?

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STATEMENT OF THE CASE

The Charter Township of Van Buren commenced this action on November 6, 2000. It sought to enjoin direct violations of its ordinances by defendant Garter Belt, Inc. Since the late 1970's or early 1980's, Garter Belt has operated and continues to operate a topless bar in the Township doing business as Legg's Lounge. Since it has been in business, Garter Belt has also been licensed by the Michigan Liquor Control Commission to sell alcoholic beverages to patrons of its Legg's Lounge on the premises. (Pet. App., 55a, 57a, Complaint, 11/6/00, ¶8).

Over the last several years, the Van Buren Township has been in the process of a complete land use review that has included revisions to its master plan, zoning ordinances, and zoning classifications. That review and revision process began on August 27, 1997 when the Township's planning commission authorized implementation of the process. As it relates to the subject matter of this case, the Township's land use review and revision process lasted until 1999, when the Township, effective March 11, 1999, adopted new land use regulations and zoning ordinances that included a package of new and revised ordinances addressing what are called sexually-oriented businesses—"SOBs" (Pet. App., 57a, Complaint, ¶10).

The package of SOB ordinances adopted by the Van Buren Township's Board of Trustees and effective following publication on March 11, 1999, contains Ordinance Section 6-69 of the Charter Township of Van Buren Code of Ordinances. It is entitled "Nudity on Licensed Premises." This is the only ordinance enforced or in any way at issue in this case. In full substantive part, the ordinance states as follows:

> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow

> the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> (a) the whole or part of the pubic region;
>
> (b) the whole or part of the anus;
>
> (c) the whole or part of the buttocks;
>
> (d) the whole or part of the genitals;
>
> (e) the breast area including nipple, or more than one-half of the area of the breast. (Pet. App., 176a).[1]

In the Legg's Lounge, female dancers regularly expose for view their "breast area including nipple, or more than one-half of the area of the breast," while patrons of the bar are sold, served and consume alcoholic beverages—this is uncontested. (Pet. App., 58a, 59a, Complaint, ¶¶11, 13). On August 29, 2000, Van Buren Township, through its Director of Planning and Development, sent a letter to the owner of the Garter Belt and informed him that Garter Belt was in violation of various ordinances of the Township regulating sexually-oriented businesses, including the nudity-on-licensed-premises ordinance. (Pet. App., 59a, ¶15). By the same letter, Van Buren Township requested that the Garter Belt stop violating the ordinance. (*Id.*)

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1. An ordinance of almost identical language to that in question here was adopted by the Charter Township of Clinton, Michigan. The ordinance adopted by Clinton Township was challenged on the same constitutional and other grounds as the defendant here challenges the Van Buren Township's nudity-on-licensed-premises ordinance. The result was the decision in *Jott, Inc. v. Charter Township of Clinton*, 224 Mich. App. 513, 569 N.W.2d 841 (1997).

Meetings were had and letters exchanged between counsel for the Township and the lounge in attempts to resolve this matter short of litigation. Those efforts were not fruitful. (Pet. App., 59a, ¶16). When Garter Belt continued in its direct violation of the ordinance in question, the Township filed this action on November 6, 2000. Van Buren Township also filed a motion for preliminary injunction. (Motion to Show Cause; 11/6/00).

Garter Belt answered the complaint on 11/30/00. Doing so, it raised various defenses under the Michigan equivalent of the First Amendment to the United States Constitution. (Pet. App., 62a, Answer and Affirmative Defenses, 11/30/00; Pet. App., 66a, Affirmative Defense Nos. 5-10, 13). Garter Belt likewise averred that the Township's Ordinance was preempted by certain state laws. Following an unsuccessful attempt at removal of the case to federal district court, Garter Belt filed a counter-claim. There, it raised arguments under the First and Fourteenth Amendments to the United States Constitution. (Pet. App., 70a, Counter-Complaint, 10/1/01). The parties engaged in extensive discovery.

In turn, the Township brought a motion for summary disposition. Garter Belt opposed the motion. The trial court granted that motion following a hearing held on November 30, 2001. (Transcript, 11/30/01, pp 15-16). In ruling in favor of the Township, the trial court determined that there was no genuine issue of material fact and relied upon the holding in *Jott, Inc. v. Charter Township of Clinton*, 224 Mich. App. 513, 569 N.W.2d 841 (1997) stating that the issue was whether there was a rational basis for the legislative action. (Transcript, 11/30/01, pp 15-16). Subsequently, on December 14, 2001, the trial court entertained oral arguments on Garter Belt's motion to disqualify the trial judge. The trial court denied the motion. (Transcript, 12/14/01, p 5). Upon de novo review, the chief judge also denied disqualification. (Transcript, 12/20/01, p 19).

Upon immediate consideration, the Michigan Court of Appeals denied Garter Belt's motion for stay pending appeal and declined Garter Belt's request for reconsideration of the stay ruling. (Pet. App., 40a, 39a, Orders, 12/28/01 and 1/9/02). The Michigan Supreme Court likewise denied a stay and declined to grant Garter Belt's application for leave to appeal prior to a decision by the Michigan Court of Appeals. (Pet. App., 37a, Supreme Court No. 120762; 1/23/02).

Following oral arguments on September 16, 2003, the Michigan Court of Appeals issued its published opinion on September 25, 2003. (Pet. App., 2a, Michigan Court of Appeals No. 23851). There, the court of appeals affirmed the trial court's summary disposition ruling in favor of the Township as well as the permanent injunction enforcing Van Buren Township's ordinance prohibiting nudity at liquor-licensed establishments. (*Id.*). Garter Belt then sought leave to appeal to the Michigan Supreme Court. In its order of June 24, 2004, the supreme court denied Garter Belt's application for leave to appeal the September 25, 2003 judgment of the court of appeals. (Pet. App., 1a, Michigan Supreme Court No. 124831).

REASONS FOR DENYING THE PETITION

I. The Decision Of The Michigan Court Of Appeals That Enforcement Of A Township Ordinance Banning Nudity On Premises Licensed To Serve Liquor Is Consistent With This Court's Precedent.

Van Buren Township's Ordinance § 6-69 prohibits nudity in any establishment licensed or subject to license by the Michigan Liquor Control Commission. It is a content-neutral regulation since it prohibits nudity on all licensed premises. As such, any constitutional challenges leveled at the Township's ordinance are properly considered under the relaxed rational basis standard. Analysis should also take into account a state's right to regulate liquor.

A state has absolute power under the Twenty-First Amendment[2] to totally prohibit the sale of liquor within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S. Ct. 163, 84 L. Ed. 2d 128 (1939). It is equally well established that a state has broad power under the Twenty-First Amendment to regulate the times, places, and circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981). The Twenty-First Amendment gives broad regulatory power to the states and generally they may delegate this power as they see fit. *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383, 93 L. Ed. 2d 334 (1986). It has been said about the broad powers of the Twenty-First Amendment that they confer something more than the normal state authority over public health, welfare, and morals, *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) and *Hostetter v. D. Idlewild Liquor Corp.*, 377 U.S. 324, 330, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964). Thus, while the reach of the Twenty-First Amendment is certainly not without limit, this Court's previous decisions have repeatedly declared that, in the context of liquor licensing, the Twenty-First Amendment confers broad regulatory powers on the state. *Iacobucci*, *supra*.

Accordingly, consideration of any state law regulating intoxicating beverages must begin with the Twenty-First Amendment. Thereunder, wide latitude as to the choice of means to accomplish a permissible end must be accorded to a state agency that is itself the repository of the power under the Twenty-First Amendment, *LaRue*, *supra*. That being the situation, the *LaRue* court upheld the facial constitutionality of a state regulation prohibiting acts of "gross sexuality" and live or filmed performances of sexual acts in establishments licensed by the state to serve liquor. Although the court recognized that not all

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2. The Twenty-First Amendment provides in relevant part that: "[the]transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

prohibited acts would be found obscene and were thus entitled to some measure of protection under the First Amendment, the challenged statute was within the state's broad power under the Twenty-First Amendment to regulate the sale of liquor. Upholding the regulations before it, the *LaRue* court said as follows:

> The substance of the regulation struck down prohibits licensed bars or night clubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.
>
> Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troop in a theatre.
>
> The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur

> at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the 21st Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution.

409 U.S. 109, 118-19.

In subsequent decisions, the Court reaffirmed its *LaRue* holding. For example, in *Doran v. The Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975), the Court considered a First Amendment challenge to an ordinance that prohibited females from appearing topless not just in bars but in "any public place." The Court upheld a preliminary injunction against the enforcement of the ordinance banning topless dancing. Doing so, however, the court invoked the rule of *LaRue*, *supra* to the effect that the broad powers of the states to regulate the sale of liquor as conferred by the Twenty-First Amendment outweigh any first amendment interest in nude dancing such that a state could, therefore, ban such dancing as part of its liquor license program. As the *Doran* court explicitly recognized, a more narrowly drawn statute would survive judicial scrutiny under the Twenty-First Amendment:

> Although the customary "bar room" type of nude dancing may involve the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances. In *LaRue*, however, we concluded that the broad powers of this State's to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program.

422 U.S. at 932-33.

In *New York State Liquor Authority v. Bellanca*, *supra*, the Court considered a First Amendment challenge to a New York liquor law banning nude dancing at establishments licensed to sell liquor for consumption on the premises. Based on that scenario, the court reviewed its decisions in *LaRue*, *supra*, and *Doran*, *supra*, and found that the state's conduct was authorized. Under the Twenty-First Amendment, New York possessed the power to ban the sale of alcoholic beverages. It could also ban the sale of liquor on premises where topless dancing occurred. The state's power to ban the sale of alcoholic beverages entirely included the lesser power to prohibit the sale of liquor on premises where topless dancing occurs. The fact that New York chose to avoid disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption was entirely appropriate. Accordingly, given the added presumption in favor of the validity of state regulation as conferred by the Twenty-First Amendment, the *Bellanca* court determined that New York's policy choice did not violate the United States Constitution:

> In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulations" conferred by the Twenty-First Amendment, *California v. LaRue*, 409 U.S., at 118, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-First Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a

> harmless diversion, the Twenty-First Amendment makes that a policy judgment for the state legislature, not the courts.

452 U.S. 714, 718.

Last, in *City of Newport, Kentucky v. Iacobucci, supra*, the City enacted an ordinance that prohibited nude or nearly-nude dancing in local establishments licensed to sell liquor for consumption on the premises. Finding that the *Bellanca* case controlled inasmuch as the authority under the Twenty-First Amendment extended to a City, the *Iacobucci* court reiterated that, while the reach of the Twenty-First Amendment is certainly not without limit, prior decisions have established that, in the control of liquor licensing, the Amendment confers broad regulatory powers on the states. 479 U.S. at 94-95. Thus, the states have full authority to regulate the times, places, and circumstances under which liquor may be sold. The court has never attached any constitutional significance to a state's division of its authority over alcohol. The Twenty-First Amendment gives broad powers to the states and to those entities to whom they delegate their power as they see fit. It was plain to the *Iacobucci* court that the interest in maintaining order outweighed the interest in the expression by dancing nude and that any delegation of the power to the electorate to decide if liquor could be served in different establishments did not change the result.

Petitioner insists that this Court implicitly overruled *LaRue* in *44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484, 115 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). A careful review of the opinion reveals the lack of merit in that suggestion. Before the court in *44 Liquor Mart* were two separate prohibitions enacted by the Rhode Island legislature. The first applied to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibited them from advertising in any manner whatsoever the price of any alcoholic beverage offered for sale in Rhode Island. The second statute applied to the Rhode Island news media. It contained a categorical

prohibition against the publication or broadcast of any advertisements that "make reference to the price of any alcoholic beverages." The Court granted leave to appeal to address both the First Amendment issue *as well* as the suggested relevance of the Twenty-First Amendment. Even under the less than strict standard generally applicable in commercial speech cases, the Court found that the state failed to establish a "reasonable fit" between its abridgement of speech and its temperance goal. 517 U.S. at 507. Thus, the Court necessarily held that the price-advertising ban could not survive more stringent constitutional review. 517 U.S. at 508.

From there, while discussing the impact of the Twenty-First Amendment and the Court's earlier *LaRue* decision, the *44 Liquor Mart* court noted that it had been persuaded that the analysis in *LaRue* would have led to precisely the same result even if no reliance had been placed on the Twenty-First Amendment. Without questioning the holding in *LaRue*, the *44 Liquor Mart* court disallowed the reasoning employed there insofar as it relied on the Twenty-First Amendment. It said that, although the Twenty-First Amendment limits the effect of the dormant commerce clause on a state's regulatory power over the delivery or the use of intoxicating beverages within its borders, the amendment does not license the states to ignore their obligations under other provisions of the Constitution. Stated otherwise, the Twenty-First Amendment does not in any way diminish the force of the supremacy clause (*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-14, 100 S. Ct. 937, 63 L. Ed. 2d 233 [1980]) of the establishment clause (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5, 103 S. Ct. 505, 74 L. Ed. 2d 297 [1982]), or of the equal protection clause (*Craig v. Boren*, 429 U.S. 190, 209, 97 S. Ct. 451, 50 L. Ed. 2d 397 [1976]). The *44 Liquor Mart* court saw no reason why the First Amendment should not also be included in that list. Accordingly, the *44 Liquor Mart* court held that the Twenty-First Amendment does not nullify the constitutional prohibition against laws abridging freedom

of speech as embodied in the First Amendment. The Twenty-First Amendment could not save Rhode Island's ban on liquor price advertising. Thus, to the extent that the *44 Liquor Mart* court retreated from the holding in *LaRue*, *supra*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by the Twenty-First Amendment. While so holding, the *44 Liquor Mart* court nevertheless emphasized that, on account of a State's ample powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*, the *LaRue* analysis would have yielded the same result independent of the Twenty-First Amendment.

Significantly, the *44 Liquor Mart* court did not question or tamper with the holding in *LaRue*, *supra*. At best, the *44 Liquor Mart* court disavowed the *LaRue* reasoning insofar as it relied on the involvement and application of the Twenty-First Amendment. However, because of the ample power vested in a state to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of activities described in *LaRue*, the *44 Liquor Mart* court utilized that same rational basis standard of review to find that a state's inherent police powers provided ample authority for the ban on the advertisements containing accurate information about retail prices of alcoholic beverages. The inherent police powers vested in a state are all that is needed to restrict the kind of behavior described in *LaRue*. That, no doubt, explains the absence of any statement by the *44 Liquor Mart* court that a higher level of scrutiny than rational basis is required when reviewing a state's ~~exercise~~ of its police power under the Twenty-First Amendment to regulate appropriate places to sell alcohol.

The essence of the *44 Liquor Mart* holding is "that a state's inherent police powers derived from the Twenty-First Amendment to prohibit, restrict, or limit the sale of alcoholic beverages in inappropriate locations is sufficient to prompt application of the rational basis standard of review." Thus, the

Michigan Court of Appeals decision is not inconsistent with *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 191 L. Ed. 2d 265 (2000) and the *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). In the former, the subject restriction did not address where alcohol may be sold but concerned a community-wide ban on nudity similar to that found in *Doran, supra*. As such, the case did not call into question the state's exercise of its police power to regulate the sale of alcoholic beverages and conduct that occurs in liquor-licensed premises. As to the *Alameda Books* case, the question before the court was whether the City of Los Angeles could rely upon a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses. The Court used the opportunity to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that portray sexually explicit materials. The Court allowed the city to rely upon its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. The rule to be derived from the *Alameda Books* case is that any governmental unit is entitled to rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and the substantial independent government interest.

Garter Belt criticizes the Township for failing to offer evidence that it relied on adverse secondary effects when it adopted its ordinance. (Petition, p. 9). But this argument is based on a misunderstanding of the correct analysis of the requirements. A municipality is "not required to conduct new studies or produce evidence independent of that generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The focus of any inquiry into a statute or ordinance such as this is "not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or non-existence of a current

governmental interest in the service of which the challenged application may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

The Court has declined "to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Federal courts have also concluded that evidence of secondary effects occurring even years after the enactment of an ordinance may be used to demonstrate a substantial governmental interest in limiting those secondary effects. *See, e.g., Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272 (10th Cir. 2002); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (6th Cir. 1997); *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371-72 (5th Cir. 1998). Petitioner seeks to challenge the ordinance but fails to address the Township's knowledge of what has taken place in and around nude dancing establishments in southeastern Michigan. Unless a challenger succeeds in casting doubt on a municipality's rationale, by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes a municipality's findings, the municipality meets the standard set forth in *Renton. City of Los Angeles v. Alameda Books*, 535 U.S. 425, 439-39, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). The petitioner has not done so.

The Township thoroughly investigated the adverse secondary effects of nudity on liquor-licensed premises before adopting its ordinance. It examined several reports and memoranda from its planner, McKenna Associates, Inc. As part of its evaluation for updating its ordinance, the Township's development director also conducted a study comparing, over a nine-year period, the number of calls for police services to Legg's Lounge with a similarly situated commercial shopping plaza containing a number of businesses but no nude dancing or topless entertainment. The Township determined that the number of calls was more than 30% more calls. (Exhibit C to Motion for

Summary Disposition, Kelley Deposition, 7/25/02. pp 20-22). This history of adverse secondary effects from the existence of a topless bar in which nudity is allowed, in part, prompted the Township to adopt its ordinance. Thus, this argument provides no basis for granting the petition.[3]

At least two factors warrant the application of the rational basis standard of review. The first is the involvement of the Twenty-First Amendment and the added presumption which it brings in favor of the validity of state regulation of liquor-licensed premises. The second derives from the inherent police powers of a governmental agency to regulate the traffic of liquor within its boundaries and to restrict the kinds of activities associated therewith. Without any aid from the Twenty-First Amendment, the state's ordinary police power are adequate to support the Township's ordinance. *44 Liquor Mart* so held when it pointed out that it would have reached "precisely the same result [in *LaRue*] if it had placed no reliance on the Twenty-First Amendment." 517 U.S. at 515, 116 S. Ct. 1495. Further, the prohibition on nudity applies only to establishments that are licensed by the state to serve liquor.

The above discussion underscores Van Buren Township's position that this case is not an appropriate one for the Court's consideration. The Michigan courts applied the correct law and reached the proper conclusion. Their holding is consistent with the case law authority cited above. Read as a whole, the cases are consistent. They attest to the propriety of the Michigan Courts' utilization of a rational basis standard of review.

Even if required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral, time,

3. In addition, respondent is prepared to lodge with the clerk's office, official court records demonstrating convictions for illicit activities in the very premises at issue here. Thus, as to these premises, the Township can, not only rely on secondary effects as studied by other jurisdictions, but as evidenced by a series of criminal convictions for conduct on the premises. In addition, respondent has requested to lodge with the clerk's office three studies from the township's planner that demonstrate adverse secondary effects.

place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative means of communication, Van Buren Township has met its burden. An ordinance that does not suppress protected forms of sexual expression, but which is designed to combat the undesirable secondary effects of business that accompany such activity is to be reviewed under the standards applicable to content-neutral, time, place, and manner regulations, *Renton v. Playtime Theatres*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The Michigan Court of Appeals evaluated the ordinance under intermediate scrutiny as well. The court stated, at 22a-23a of cert. petition,

> So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely upon the finding adopted by the Supreme Court and by this Court that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior." *Bellanca*, *supra*, 452 U.S. at 718; *Jott*, *supra* at 546.
>
> * * *
>
> Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance we still find it is a constitutional content-neutral time, place and manner regulation designed to combat adverse secondary effects of the combination of alcohol and nudity that allows for reasonable alternative avenues of communication. *Iacobucci*, *supra* at 96-97; *Jott*, *supra* at 527, 545-546.

The petition should be denied because, regardless of the standard, the Michigan Court of Appeals has properly concluded

that the ordinance passes constitutional muster. This case would be decided in the same way under the intermediate scrutiny standard.

The claimed conflict in standards pointed to by petitioners is not a sufficient reason for granting review. For example, in *South Dakota v. Kansas City S. Industries, Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990), the Court denied certiorari to resolve a split regarding the standard for the "sham" exception to the *Noerr-Pennington* doctrine where there was an alternate ground for affirming the decision. As the Court stated in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 3 L. Ed. 2d 723 (1959): "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the . . . [issue] can await a day when the issue is posed less abstractly." Similarly, the Court has denied certiorari where resolution of even a clear conflict is irrelevant to the ultimate outcome of the case. In *Sommerville v. United States*, 376 U.S. 909, 84 S. Ct. 663, 11 L. Ed. 2d 608 (1964), certiorari was denied despite the Government's concession that a live conflict existed as to state or federal law controlled the determination of the type of liability in question and that it would be in the interest of the Government to have this recurring and important issue settled. But it was evident that the resolution of the conflict would not change the result below, since the petitioner would be liable under either federal or state law.

The issue presented here is similarly abstract. Michigan's intermediate appellate court analyzed the constitutionality of the challenged-ordinance under both the rational basis and intermediate scrutiny standards. It passes constitutional muster under both standards. Even if this Court deems the question of *LaRue's* viability to be an important issue, certiorari should be denied because the standard will not change the outcome in this case. In addition, the Court has traditionally adhered to a policy of letting tolerable conflicts go unaddressed because

"experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." Justice Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 183 (1982). Petitioner has not pointed to a lengthy history of increasing confusion or conflict between many states or federal intermediate appellate courts, a situation that might present a stronger basis for granting certiorari. Petitioner points only to a claimed conflict between an intermediate state court decision and decisions by this Court and the Sixth Circuit. The decision does not conflict with *LaRue* as refined by *44 Liquor Mart*. Moreover, while the petitioner claims the decision conflicts with decisions of the Sixth Circuit, the petitioner cites none. In addition, the claimed conflict involving the correct standard will not affect the outcome. For all these reasons, certiorari should be denied.

II. The Decision Of The Michigan Court Of Appeals That Respondent Charter Township Of Van Buren's Ordinance Banning Nudity In Establishments That Are Licensed By The Michigan Liquor Control Commission Is Not Overly Broad Or Vague Under The First Amendment And Follows Federal Precedent Set By This Court.

The petitioner's attempt to disguise this constitutional law issue as one that conflicts with this Court's precedent or presents an unsettled issue in the First Amendment arena is misplaced. Rather, the Michigan Court of Appeals' decision that the respondent's ordinance that bans nudity in establishments that are licensed to sell alcohol by the Michigan Liquor Control Commission is neither overly broad or void for vagueness it is commensurate with well-settled principles set forth by this Court. As such, certiorari is unwarranted.

To establish a facial challenge to an ordinance on the ground that it is overbroad requires the challenger to show that there is "a realistic danger that the statute itself will significantly

compromise recognized First Amendment protections of parties not before the Court." *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). The regulation's overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). But, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Los Angeles City Council*, 466 U.S. at 801. This Court has stated that the overbreadth doctrine should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613.

As the Michigan Court of Appeals properly held, the respondent's ordinance is not unconstitutionally overbroad because there is no real and substantial possibility that it will deter third parties from engaging in protected expressive conduct at establishments that are not licensed to sell liquor. The ordinance expressly limits the ban on nudity to establishments that are licensed to sell liquor, removing any risk that the ban would extend to unlicensed establishments. Consequently, as the Michigan Court of Appeals identified, the ordinance's "plain and legitimate sweep" is to "regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets, or taverns" to accomplish its purpose, "to eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Charter Township of Van Buren v. Garter Belt Inc.*, 258 Mich. App. 594, 673 N.W.2d 111 (2003).

Moreover, petitioner's concern over a person using the restroom in a liquor licensed establishment is misplaced, as the First Amendment protection at issue governs expressive conduct. As the Michigan Court of Appeals noted, "tavern patrons using restroom facilities are generally not engaged in expressive conduct." *Id.*

Further, the ordinance is unlike the ordinances underlying the two cases upon which petitioner heavily relies, *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) and *J.L. Spoons, Inc. v. O'Connor*, 194 F.R.D. 589 (N.D. Ohio 2000). In *Triplett*, the City of Akron enacted an ordinance that prohibited public nudity in public places.[4] The Akron ordinance contained no limit on the ban to those establishments that are licensed to sell liquor, unlike the instant ordinance.[5] Thus, the Michigan Court of Appeals properly distinguished the two cases.

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4. The ordinance at issue in *Triplett* provided:

> (A) No person shall knowingly or intentionally, in a public place:
>
> (1) Engage in sexual intercourse;
>
> (2) Engage in deviant sexual conduct;
>
> (3) Appear in a state of nudity; or
>
> (4) Fondle the genitals of himself or another person.
>
> (B) For the purpose of this section only, the following definitions shall apply:
>
> "*Nudity*" means the showing of the human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.
>
> "*Public Place*" means any street, sidewalk, right of way and any public or private building or place where the general public is invited.

Triplett, 40 F.3d at 131 n.2.

5. The *Triplett* court also reasoned that the ordinance was invalid because the challenger established no link between nudity in non-adult entertainment from all public places and secondary effects. Here, respondent's ordinance does not ban nudity from all public places, only liquor licensed establishments, and respondent set forth evidence of secondary effects from nudity shown in liquor-licensed establishments.

In *J.L. Spoons*, the United States District Court for the Northern District of Ohio considered whether the following ordinance was unconstitutionally overbroad:

> (A) Definitions as used in this rule:
>
> (2) "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and/or areola; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region, or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of the nipples and/or areola.
>
> (B) Prohibited activities: no permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:
>
> (2) Appear in a state of nudity;
>
> (3) Engage in sexual activity as said term is defined in ORC Chapter 2907.

J.L. Spoons, 314 F. Supp. 2d at 751-752, footnote omitted.

The *J.L. Spoons* court invalidated this ordinance because it simply broadened the definition of nudity to include language that prohibited nudity-simulating costumes in liquor licensed establishments:

> By substituting broader language covering non-nude performances, and by failing to in any way address the Court's clearly articulated concern for exempting mainstream artistic performances, the State appears to reach well beyond the realm of speech reasonably associated with the secondary effects it seeks to curtail.

Id. at 760.

The instant ordinance cannot be read so broadly to prohibit non-nude performances as the one in *J.L. Spoons*. Rather, the express definition of "nudity" contains no reference to any action that may simulate nudity or other non-nude action. Thus, the instant case is distinguishable from *J.L. Spoons*.

Accordingly, after applying the above-referenced, well-established principles of an overbreadth challenge to a local ordinance under the First Amendment, the Michigan Court of Appeals properly concluded that the respondent's ordnance passed constitutional muster. As a result, this issue is not one appropriate for this Court's consideration.

This Court has identified two reasons why a statute can be impermissibly vague: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), citing *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999). The ordinance is not vague if "it is clear what the ordinance as a whole prohibits." *Hill v. Colorado*, 530 U.S. at 733. Moreover, similar to an overbreadth challenge, speculation about possible vagueness

in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid "in the vast majority of its intended applications." *Id.*, citing *United States v. Raines*, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Here, petitioner's only challenge to the ordinance based on the vagueness doctrine is that there is no "precision in draftsmanship" because one cannot decipher the words "directly or indirectly" in the definition of "nudity." This challenge, however, ignores a fundamental rule in a vagueness determination, that precision is not a requirement, as "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). As long as it is clear, as a whole, what the ordinance prohibits, the ordinance is not invalid on a vagueness basis. *Id.* As the Michigan Court of Appeals properly reasoned, the instant ordinance plainly puts persons of ordinary intelligence that nudity, which the ordinance clearly defines, is not allowed in Michigan Liquor Control Commission licensed establishments.

Accordingly, after applying the above-referenced, well-established principles of a vagueness challenge to a local ordinance under the First Amendment, the Michigan Court of Appeals properly concluded that the respondent's ordnance passed constitutional muster. As a result, just as with the overbreadth issue, this issue is not one appropriate for this Court's consideration.

III. Injunctive Relief To Ensure Enforcement Of An Ordinance Banning Nudity In Places Where Liquor Is Sold Does Not Amount To Prior Restraint.

The term "prior restraint" describes administrative and judicial orders that block expressive activity before it can occur. *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771, 125 L. Ed. 2d 441 (1993). Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials. *See Shuttlesworth v. City of Birmingham*,

394 U.S. 147, 151, 89 S. Ct. 935, 939, 22 L. Ed. 2d 162 (1968). In that vein, laws that impose a prior restraint on free speech have been disfavored by the courts as tantamount to censorship and thought control. *See Near v. Minnesota*, 283 U.S. 697, 713, 51 S. Ct. 625, 630, 75 L. Ed. 1357 (1931). But not all injunctions are impermissible. The Supreme Court's decision in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) undercuts any argument to that effect. In that case, the Supreme Court upheld against a First Amendment challenge certain guidelines adopted to control the volume of amplified music at a New York City amphitheater. Under the guidelines, the city employed a sound technician who would be on hand at all performances to control the volume and mix of amplified sound. The respondents in *Ward* argued that this arrangement empowered the city to screen, distort, or altogether shut off speech in advance of its expression, and as such, should be invalidated as a prior restraint in violation of the First Amendment.

The Supreme Court disagreed, and identified perhaps the most important characteristic that sets apart legitimate government regulations from impermissible prior restraints content-neutrality. The essence of the prior restraint doctrine is censorship—a system in which bureaucrats screen material and remove from it parts that are considered too harmful or offensive for public consumption. The key to *Ward* was that the object of the New York City guidelines was not to police the content of performances at the amphitheater, but to eliminate excessive noise from unregulated amplified sound. *See id.* at 795. In that respect, Van Buren Township's ordinance presents a case almost identical to *Ward*. The function of the ordinance is to prevent nudity in premises licensed for the sale of liquor. The ordinance is content-neutral, regulating only the time, place, and manner in which nudity can take place.

The perfect contrast to *Ward*, further illustrating the importance of content-neutrality to the doctrine of prior restraint, is *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971). Unlike *Ward*, the Court in *Keefe* confronted a government order that discriminated on the basis of content. In that case, a community organization in the Austin neighborhood of Chicago launched a leafletting campaign to stop the "blockbusting" practices of a local real estate broker. The organization contended that the broker "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings, and sell homes to Negroes." *Id.* at 416. The Supreme Court reversed a court order enjoining the organization from distributing pamphlets critical of the broker's business practices. Rejecting arguments that the organization's activities invaded the broker's right to privacy, the Court held that

> under *Near v. Minnesota* . . . the injunction, so far as it imposes a prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of [the content of] previous publications, distribution of literature "of any kind" in a city of 18,000.

Id. at 418-19.

Garter Belt argues that the permanent injunction constitutes a prior restraint. But the authority it relies on in support of this proposition is inapposite. *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980), for example, did not involve an injunction requiring a liquor licensee to comply with a narrowly-drawn ordinance that prohibits nudity on licensed premises. Nor was the injunction in *Vance* capable of enforcement without the exercise of extensive government discretion. Instead, the injunction struck

down in *Vance* was issued as a matter of state law to prohibit the exhibition of motion pictures that had not yet been ruled obscene. The state procedural rules governing injunctions, when coupled with the public nuisance statute, allowed state judges to issue injunctions on the basis of a showing that obscene films had been exhibited in the past. The court prohibited injunctive relief of this kind because it would allow prior restraint of speech without any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures without regard to the context in which they are shown.

Unlike in *Vance*, the injunction at issue here merely provides an extra enforcement tool to prevent violation of regulated conduct. The ordinance prohibits nudity, as specifically defined, on premises licensed for the sale of liquor. The ordinance has already been determined to be a permissible regulation; and not a violation of the First Amendment. The precise conduct (nudity as defined in the ordinance on licensed premises) has already been determined to be unprotected. As a result, the ordinance does not amount to a prior restraint of protected speech. Nor is there a possibility that, as with a future motion picture, some doubt as to what conduct falls within the ordinance will lead to protected conduct being enjoined.

The lack of content-neutrality is not the only feature that identifies a system of prior restraint. A content-neutral regulation that "[places] unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 2144, 100 L. Ed. 2d 771 (1988). In other words, when a regulation fails to place appropriate limits on the discretion of public officials to administer the law in a manner that is abusive of speech, the result should be no different than if the law had brazenly set out to discriminate on the basis of content. At stake is the risk that in the absence of "narrowly drawn, reasonable and definite standards for the officials to follow," the law invites

opportunities for the unconstitutional suppression of speech. *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S. Ct. 325, 327, 95 L. Ed. 267 (1951); *Kunz v. New York*, 340 U.S. 290, 295, 71 S. Ct. 312, 315, 95 L. Ed. 280 (1951).

This case does not present such a risk. Unlike other laws the courts have struck down as prior restraints, the permanent injunction does not leave open important questions of enforcement to official discretion. *See Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (law that prohibited discussion of religious matters in public places was held unconstitutional where what constituted religion was left to official discretion). In fact, in at least one case involving the regulation of amplified sound, the Supreme Court has expressed a preference for content-neutral and narrowly-drawn standards of the exact type at work in the Westerville ordinance. In *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (1948), the Court held unconstitutional a New York City ordinance that prohibited the use of sound-amplifying equipment in public places without the permission of the chief of police. Much like *Cantwell*, the key factor in *Saia* was that the law, although content-neutral, prescribed no standards for the exercise of official discretion. The Court stated that the "statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they may be adjusted." *Id.* at 560. It went on to conclude that "noise can be regulated by regulating decibels." *Id.* at 562.

The issue raised here is unlike that presented in *Tory v. Cochran*, a case in which the petition was granted on September 28, 2004. The question presented there was "whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." *Tory v. Cochran*, Supreme Court No. 03-1488. In *Tory*, well-known attorney, Johnnie Cochran, Jr., sued his former client for defamation and invasion of privacy after Tory and others began picketing Cochran outside of his

office and outside the state supreme court carrying placards calling him a liar and making other statements. *Cochran v. Tory*, 2003 Cal. App. LEXIS 10227 (2003), *cert. granted*, 159 L. Ed. 2d 856 (2004). Typical of the statements were these: "Hey, Johnnie how much did they $$you to f—me?" and "Johnnie Cochran, I know what you, the County, and the City did to my case" and "Johnnie is a crook, a liar, and a thief." A California intermediate appellate court held that this was sufficient for liability under state law because it was a false statement reasonably calculated to induce the reader to understand that a person is guilty of a crime or is dishonest in his profession.

The appellate court upheld a remedy that included a permanent injunction precluding Tory from continuing his unlawful conduct. The court did so despite Tory's argument that the injunction was overbroad since it prohibited him or those associated with him from "(i) picketing Cochran [or] Cochran's law firm; (ii) displaying signs, placards, or other written or printed material about Cochran [or] Cochran's law firm; (iii) orally uttering statements about Cochran [or] Cochran's law firm. . . ." 2003 Cal. App. Unpublished LEXIS 10227, *5.

Although both appellate courts upheld injunctions prohibiting future unlawful conduct, the injunction in this case was not based on a common law cause of action that would require a substantial amount of discretion in line-drawing between permissible and impermissible conduct. Nor did it involve an absolute prohibition on the protected conduct. Here, the protected conduct as raised by Garter Belt is nude, expressive dancing. Nothing in the injunction restrains such dancing per se. Instead, the injunction merely recognizes the validity of the Township's ordinance prohibiting such conduct on liquor-licensed premises. The injunction here does not potentially reach protected conduct. Unlike in *Tory*, where all comments about Cochran have been restrained even though some statements that Tory might make about him would be protected by the First Amendment, the injunction here carefully restrains only future

violations of a narrowly-drawn ordinance that does not reach protected conduct. Thus, the petition should be denied.

The permanent injunction does not grant unfettered discretion to government officials. Nor does it reach protected conduct. To the extent that the injunction merely restrains future violations of the Township's valid ordinance, which bars nudity on premises licensed for the sale of liquor, it does not burden the content of protected speech, or permit unfettered official discretion. The Van Buren Township ordinance leaves entirely untouched the ability of nude dancers to perform; it merely prevents nudity of all types in premises licensed for the sale of liquor. The chief concern which animates the doctrine of prior restraint—the fear of censorship—is not raised by the ordinance's content-neutral regulation of nudity on premises licensed for the sale of liquor. Thus, it is consistent with this Court's precedent and the writ should be denied.

CONCLUSION

Wherefore, Respondent respectfully requests that this Court deny The Garter Belt, Inc.'s petition for writ of certiorari.

Respectfully submitted,

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